IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 301 of 1989

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ATMARAM ISHWARBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 301 of 1989

MR SV PARMAR for the Petitioner

MR LR PUJARI, PUBLIC PROSECUTOR for the Respondent

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 11/12/2001

ORAL JUDGEMENT

#. Heard the learned advocates.

#. This Revision Application preferred under Section

397 read with Section 401 of the Code of Criminal Procedure arises from the judgment and order dated 30th August, 1989 passed by the learned Additional City Sessions Judge, Ahmedabad Court No.19 in Criminal Appeal No.90/1988.

#. The petitioner herein was, at the relevant time, serving as a Cashier in the Government Polytechnic at Ahmedabad. It was alleged that the petitioner was responsible for maintaining accounts and for safe keeping of cash received by the Polytechnic. The cash was kept in a safe. The safe could be opened by two keys; one of which was maintained by the petitioner and the other by the Registrar of the Polytechnic. On 8th April, 1983 the Registrar was on leave. He, therefore, handed over the key maintained by him to the petitioner through his son. On 8th April, 1983, since afternoon the petitioner absented himself and remained absent till 15th April, 1983. The keys of the safe were recovered from the wife of the petitioner under a Panchnama. On 16th April, 1983 the safe was opened in presence of the police and the panch witnesses. From the safe certain sum of cash was recovered and also wasrecovered a note (Ex.7) alleged to have been written by the petitioner in his hand. The cash book was found unsettled. After settling the accounts, the cash recovered from the safe was found to be short by a sum of Rs.42,427=90. The petitioner was thus accused of committing offence punishable under Section 409 of the Indian Penal Code. The petitioner accused was tried by the learned Metropolitan Magistrate, Court No.9, Ahmedabad. The learned Magistrate by his judgment and order dated 12th September, 1988 was pleased to convict the petitioner and to sentence him to the Rigorous Imprisonment for one and a half years and a fine of Rs.2,000=00. In default of payment of fine a Simple Imprisonment for four months was imposed. Feeling aggrieved, the petitioner preferred Criminal Appeal No.90/1988 before the learned Additional City Sessions Judge, Ahmedabad, which was dismissed on 30th August, 1989. Feeling aggrieved, the petitioner has preferred the present Revision Application.

#. The prosecution has examined PW1 - the Registrar of the Polytechnic (Ex.5); PW2 - the Principal of the Polytechnic (Ex.23); PW3 - the Head Master of the Polytechnic (Ex.24), PW4 - the Peon Somabhai (Ex.25); PW5 Panch witness Padmakar (Ex.26); PW6 Kantilal Madhavlal (Ex.28); PW7 Shantaben Atmaram (Ex.29); PW8 Panch witness Bhimabhai Keshabhai (Ex.30); PW9 - the Police Officer Tersinh Varsing (Ex.31) and PW10 Panch witness Mohammadali Gulammohammad (Ex.32).

The note recovered from the safe has been produced at Ex.7. The Panchnama of opening the safe and recovering the money has been produced at Ex.27.

#. Both the courts below have believed the evidence of PW1 - the Registrar, PW2 - the Principal, PW3 - the Head Master, PW6 Kantilal and PW10 the Panch witness Mohammadali Gulammohammad. The Panch witness Padmakar (PW5) and Shantaben Atmaram (PW7) did not support the prosecution. Both the courts below have believed the statements of the witnesses that the keys of the safe were recovered from the wife of the petitioner Shantaben Atmaram (PW7). It is, therefore, held to be proved that the petitioner had misappropriated the missing money at any time during the period from 1st April to 8th April, 1983. Therefore, the conviction.

#. Mr.Parmar has submitted that there is no evidence on record to establish that the key of the safe was received/recovered from the wife of the petitioner (i.e. PW7). He has submitted that according to the statement of the Investigating Officer the keys were recovered from the wife of the petitioner under a Panchnama. However, the said Panchnama has not been produced on the records of the matter, nor any of the Panch witnesses has supported this statement. In absence of such evidence, it could not have been held to be proved that the key of the safe was recovered from the wife of the petitioner from his residence as alleged. Unless the keys of the safe were recovered from the residence of the petitioner the possibility of somebody else having an access to the safe can not be ruled out, and in such circumstances, the offence can not be said to have been conclusively proved. He has further submitted that the set of duplicate keys of the safe was not recovered from the place it ought to have been (i.e. from the office of the Treasurer). That necessarily means that duplicate keys were in the custody of somebody else in the office of the Government Polytechnic and, therefore, some person other than the petitioner also had an access to the safe. The prosecution has failed to rule out the possibility of somebody else having open the safe in absence of the petitioner. The petitioner, therefore, could not have been held guilty of the offence as has been done by both the courts below. He has also submitted that both the courts below have placed great reliance on the note Ex.7 allegedly recovered from the safe. The petitioner has been denying the writing of the said note or the handwriting in which the said note is written. Nonetheless, no handwriting expert has been examined to

establish that the note was written by the petitioner in his hand. In absence of such proof, the said note could not have been admitted in evidence, nor it could have been relied upon. The learned APP Mr.LR Pujari has supported the judgment of the courts below.

#. I am in agreement with the learned advocate Mr.Parmar. Except the statement made by the Investigating Officer, there is no other evidence which should establish that the key of the safe was recovered from the wife of the petitioner from his residence. The Panchnama, under which the said key was allegedly recovered from the wife of the petitioner alongwith other seven keys has not been produced on the records. It has also come on the record that the set of duplicate keys was required to be deposited with the Treasurer. However, the same was not deposited with the Treasurer. The whereabouts of the said set of duplicate keys have not been brought on the record (i.e. the prosecution has not proved the whereabouts of the said set of duplicate keys or that nobody else other than the petitioner had an access to the safe). The handwriting on the note Ex.7 on which the reliance has been placed has also not been proved. In my view, therefore, the prosecution has failed to rule out the possibility of any person other than the petitioner having an access to the safe. Unless such possibilities were ruled out, the offence against the petitioner could not be held to have been proved beyond all reasonable doubts. Both the courts below have committed a manifest error in not examining, whether the prosecution had ruled out the possibility of the offence having been committed by any person other than the petitioner which has resulted into miscarriage of justice. I am, therefore, of the view that the petitioner is entitled to the benefit of doubt and consequent acquittal.

#. For the reasons recorded hereinabove, the Revision Application is allowed. The judgment and order dated 30th August, 1989 passed by the learned Additional City Sessions Judge, Ahmedabad, Court No.19 in Criminal Appeal No.90/1988 is quashed and set aside. The petitioner is acquitted of the charge framed against him by giving him benefit of doubt. The bail bond be cancelled. Rule is made absolute in the above terms.

11th December, 2001. (Ms. R.M.Doshit, J.)

/sakkaf